Supreme Court, U.S.
FILED
JUN 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1660

In the Supreme Court of the United States

OCTOBER TERM, 1989

PETER J. CASTIGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a bank officer who authorized loans, the proceeds of which went to the officer rather than to the nominal borrowers, and who assured the nominal borrowers that they would not be looked to for repayment, was validly convicted of willful misapplication of bank funds under 18 U.S.C. 656.

2. Whether 18 U.S.C. 656 is impermissibly vague.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a-18a, is reported at 894 F.2d 533.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1990. A petition for rehearing was denied on March 20, 1990, Pet. App. 19a-20a, and a suggestion for rehearing en banc was denied on March 23, 1990, Pet. App. 21a-22a. The petition for a writ of certiorari

was filed on April 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on one count of conspiracy to misapply the funds of a federally insured bank, in violation of 18 U.S.C. 371, and two substantive counts of willfully misapplying the funds of a federally insured bank, in violation of 18 U.S.C. 656. Petitioner also was convicted on four counts of making false entries in bank reports, in violation of 18 U.S.C. 1005.[1] Petitioner was sentenced to an aggregate term of two years' imprisonment. The court of appeals affirmed. Pet. App. 1a-18a.

1. Petitioner was Vice President and Senior Commercial Lending Officer at the Bank of New York, which has its headquarters in Buffalo. Dèspite internal regulations prohibiting petitioner from making personal or commercial loans to himself without bank approval, petitioner on behalf of the bank made two loans to co-defendants Anthony Santiago and Richard Tocha. The evidence at trial demonstrated that Santiago and Tocha were nominal borrowers, and that the loan proceeds actually went to petitioner and his co-defendant Jack Liffiton.

In September 1981, petitioner arranged a $580,000 loan (less prepaid interest) to Santiago. The proceeds

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[1] Three co-defendants stood trial with petitioner. Co-defendant Jack Liffiton was convicted on one count of conspiracy (18 U.S.C. 371), one count of misapplication of bank funds (18 U.S.C. 656), and one count of perjury (18 U.S.C. 1623) arising out of his false grand jury testimony concealing petitioner's status as a beneficiary of the loan. Co-defendant Anthony Santiago likewise was convicted on the conspiracy and misapplication counts, and was also convicted on a third count of making false bank entries (18 U.S.C. 1005). Finally, co-defendant Richard Tocha was acquitted on all counts. The court of appeals affirmed Liffiton's and Santiago's convictions in the same opinion that disposed of petitioner's claims.

of that loan were immediately transferred to an attorney escrow account established by petitioner's friend Dmitri Tzetzo. Tzetzo in turn directed those funds through a series of circuitous transactions to petitioner, to Geneva Lands (petitioner's wholly owned real estate holding company), and to Liffiton.[2] Santiago, the nominal borrower, received only about $3,500 of the proceeds, and he treated petitioner as the real borrower. For example, Santiago failed to deduct the substantial prepaid interest on his income tax return, he did not enter the loan on his books as was his practice with his own obligations, and he explained the omission to his accountant as reflecting that petitioner was responsible for repayment since the loan was for petitioner's benefit. In fact, Santiago did not repay the loan when it became due in June 1982. Instead, petitioner arranged for its renewal. Pet. App. 4a-5a; Gov't C.A. Br. 4-9.

Later, when petitioner became aware of a federal investigation of Geneva Lands, he quickly arranged for the $580,000 loan to be repaid. Within 48 hours petitioner convinced Tocha to borrow $400,000. That $400,000 loan was made to an entity controlled by Tocha, and the proceeds were used to repay all but $180,000 of the $580,000 loan. The $180,000 difference came from Santiago, who paid the money in return for a demand note signed by petitioner. Pet. App. 5a. Tocha invoiced petitioner for the interest payments by adding those charges to bills for construction work that Tocha performed for petitioner. Tocha also admitted in an FBI interview (although he recanted at trial) that he had been assured upon signing the $400,000 bank note that he would not be called upon to repay the

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[2] Bank rules also prohibited petitioner from authorizing more than one million dollars in aggregate unsecured loans to any one borrower. Liffiton received a total of $188,000 from the $580,000 loan despite the fact that his unsecured loans at the bank already exceeded the bank's million dollar ceiling. Pet. App. 4a.

principal or interest on that loan. Pet. App. 6a; Gov't C.A. Br. 8-11.

When Santiago's accountant learned of the original loan, Santiago said he had borrowed the money for petitioner, who had handled all the transactions and was responsible for repayment of the loan. Because the accountant was concerned about the lack of documentation on the loan, he obtained a promissory note from petitioner for $180,000. Later, petitioner substituted his holding company as the obligor on the note, giving an explanation to Santiago's lawyer and accountant that served to conceal petitioner's personal interest in the loan. Pet. App. 5a-6a.

2. The district court instructed the jury that each of the alleged crimes required proof beyond a reasonable doubt of specific intent, which the court defined as an "intentional violation of a known legal duty." 23 Tr. 30-31. The court further instructed the jury that "to misapply a bank's funds [in violation of 18 U.S.C. 656] means the unlawful taking or conversion" of bank funds by an officer for the benefit of himself or another "done willfully and with a specific intent to injure or to defraud the banks." 23 Tr. 43. Finally, the court explained that if the "loan was made to a person who [petitioner] expected could and would repay it, there was no misapplication of the bank's funds," 23 Tr. 46, but that there would be misapplication if petitioner made the loan to someone he knew did not intend to repay it regardless of that person's financial ability to repay. 23 Tr. 45.

3. The court of appeals affirmed. Pet. App. 1a-18a. The court upheld petitioner's willful misapplication convictions, because in the court's view there was ample evidence that petitioner assured Santiago and Tocha that they would not be called upon for repayment and that there had been "a conscious effort to conceal the sham nature of the loans." Pet. App. 9a. In so ruling, the court held that a nominal borrower's creditworthiness does not preclude a willful misapplication conviction if the bank officer assures

the nominal borrow that he will not be required to repay the loan. Pet. App. 7a-9a. In the alternative, the court noted that its own precedent "suggested, and other Circuits have held squarely, that misapplication occurs whenever a bank officer knowingly causes a loan to be made to his own benefit, concealing his interest from the bank." Pet. App. 11a n.5.

Judge Winter dissented, citing as his "sole reason" an "inability to reconcile the present decision" with the Second Circuit's prior decision in *United States* v. *Docherty*, 468 F.2d 989 (1972). Pet. App. 13a. Judge Winter "confess[ed] some uneasiness with the *Docherty* holding," and indicated he might have agreed with his panel colleagues "on the merits" had they overruled that case either en banc or by circulating the opinion informally to the full court prior to publication. Pet. App. 17a-18a. Since the majority instead "chose[] to leave *Docherty* in place, with the confusion that will surely follow," Judge Winter explained that he felt he had "no choice but to dissent." Pet. App. 18a.

The panel subsequently denied rehearing. The one-paragraph *per curiam* opinion, which was circulated to all active Second Circuit judges prior to filing, stated that "[c]ongressional action to restrict the circumstances under which a bank may make loans to its officers, see 12 U.S.C. § 375b (1988), has cast substantial doubt on whether [*Docherty*] would be decided the same way today." Pet. App. 20a.[3] The court further clarified that "[t]o whatever extent language in *Docherty* might appear to be in conflict with our decision in *Castiglia*, our current views, informed by Congressional action, control." *Ibid.*

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[3] Apparently as a result of the court's citation to the 1988 version of the United States Code, petitioner mistakenly asserts that the enactment of 12 U.S.C. 375b "post-dates the conduct in this case by seven years and the indictment by three years." Pet. 7 n.*. In fact, Congress enacted the statute in 1978, three years *before* the conduct and seven years prior to the return of the indictment in this case.

ARGUMENT

1. Petitioner contends that the courts of appeals are divided on what conduct constitutes "willful misapplication" of bank funds in violation of 18 U.S.C. 656. Pet. 8-11. Contrary to that claim, it is clear that the result reached by the court of appeals in this case would be approved in all other circuits. Further review is therefore not warranted.

a. The Second Circuit held that bank funds are willfully misapplied when the defendant bank officer secretly receives the loan proceeds and assures the nominees that they will not be looked to for repayment, even if the nominal borrowers are creditworthy. Petitioner claims that *United States* v. *Gens*, 493 F.2d 216 (1st Cir. 1974), and *United States* v. *Docherty*, 468 F.2d 989 (2d Cir. 1972), support a contrary theory. In fact, neither case holds that the creditworthiness of a nominal borrower is an absolute shield to liability under 18 U.S.C. 656.

In *Gens*, the First Circuit expressly recognized that criminal misapplication may occur where "bank officials assured the named debtor, regardless of his financial capabilities, that they would look for repayment only to the third party who actually received the loan proceeds." 493 F.2d at 222. Indeed, as the court below observed: "[I]n *Gens* the First Circuit reversed the convictions of nominee borrowers who recognized their repayment obligations, but remanded the one count involving a wealthy individual who signed his note with the understanding that he personally would not have to repay the loan, barring some 'catastrophe.' " Pet. App. 9a (quoting 493 F.2d at 220, 223). Hence, there is no conflict between the instant case and *Gens*.

Similarly, in the Second Circuit's earlier decision in *Docherty*, the defendant named debtor "knew he was putting his own credit on the line." 468 F.2d at 995. Accord *Gens*, 493 F.2d at 223 & n.15 ("[T]he key point made by [*Docherty* is] that there can be no harm to the

bank, and thus no misapplication, where the named debtor is *both* financially capable *and fully intends to repay the loan*." (Emphasis added)). Again, there is no conflict between *Docherty* and the result here because petitioner assured the nominal borrowers in this case that they would not be looked to for repayment.

b. In the alternative, the Second Circuit held that a bank officer's approval of a loan for his own benefit, while concealing his personal interest in the proceeds, constitutes willful misapplication within the meaning of 18 U.S.C. 656. It is true that, prior to this case, the Second Circuit's *Docherty* rule seemed out of step with an otherwise unbroken line of federal circuit court authority finding misapplication whenever a bank officer knowingly caused a "loan to be made to his own benefit, concealing his interest from the bank." *United States* v. *Fortunato*, 402 F.2d 79, 81 (2d Cir. 1968), cert. denied, 394 U.S. 933 (1969).[4] The Second Circuit in this case, however, has disavowed that aspect of *Docherty*. Pet. App. 20a. In addition, it is questionable whether the First Circuit would adhere to the position it adopted in *Gens* with respect to a bank officer's concealment of his interest in a loan in light of the 1978 enactment of 12 U.S.C. 375b, which restricts the circumstances in which a federally insured bank may make loans to its officers. See *United States* v. *Krepps*, 605 F.2d 101, 106-107 n.21 (3d Cir. 1979).

2. Nor is there any merit to petitioner's claim that 18 U.S.C. 656 is unconstitutionally vague. Pet. 8-9. Every court that has considered this argument has rejected it. See, *e.g.*, *United States* v. *Krepps*, 605 F.2d 101, 104

[4] See also *United States* v. *Woods*, 877 F.2d 477, 479 (6th Cir. 1989); *United States* v. *Shively*, 715 F.2d 260, 265-266 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984); *United States* v. *Steffen*, 641 F.2d 591, 597 (8th Cir.), cert. denied, 452 U.S. 943 (1981); *United States* v. *Krepps*, 605 F.2d 101, 106-107 (3d Cir. 1979); *United States* v. *Twiford*, 600 F.2d 1339 (10th Cir. 1979); *United States* v. *Kennedy*, 564 F.2d 1329, 1338-1339 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978).

n.13 (3d Cir. 1979); *United States* v. *Mann*, 517 F.2d 259, 268 (5th Cir. 1975), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Cooper*, 464 F.2d 648, 651 (10th Cir. 1972), cert. denied, 409 U.S. 1107 (1973); *United States* v. *Fortunato*, 402 F.2d at 82.

Notwithstanding the consensus of the courts of appeals, petitioner relies upon *United States* v. *Britton*, 107 U.S. 655 (1882), for the proposition that the term "willfully misapplied" as used in an earlier version of the statute had no settled meaning. Pet. 8. In that case, however, the Court clarified that "the wilful misapplication made an offence by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association." *Id.* at 666. Accordingly, the Court held that the criminal sanction did not reach mere "acts of maladministration of the affairs of [a bank] by its officers," but instead was limited to misapplication benefiting the officer or some third party. *Id.* at 668. Consistent with *Britton*, the jury here was instructed that a "mere act of maladministration is insufficient to constitute a violation of the section." 23 Tr. 47. There was ample evidence, including the indisputable facts that petitioner personally benefited from the loans and took affirmative steps to hide his status from the bank, upon which the jury could base its verdict that petitioner acted with the necessary criminal intent.

Finally, to the extent petitioner seeks to raise a facial attack upon 18 U.S.C. 656, his claim must fail because he cannot "demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). Given the district court's detailed instructions that the jury could not convict petitioner under the statute unless he acted with specific criminal intent, see 23 Tr. 30-32, 46-47, petitioner cannot raise any colorable claim that the statute was impermissibly vague as applied to him. Cf. *Colautti* v. *Franklin*, 439 U.S. 379, 395 n.13 (1979) ("requirement of

a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid," quoting *Screws* v. *United States*, 325 U.S. 91, 101-102 (1945) (plurality opinion)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1990

U.S. GOVERNMENT PRINTING OFFICE: 1990 — 262-203/00927